Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

OCTOBER TERM, 1994

KEN BIEGELEISEN, MD,

Petitioner,

v.

JULIUS JACOBSON, MD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS**

PETITION FOR WRIT OF CERTIORARI

Ken Biegeleisen, MD
770 Lexington Avenue
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Petitioner, pro se

50pp

QUESTIONS PRESENTED FOR REVIEW

1. The case law of New York State specifically denies testamentary immunity to a physician who testifies that another physician is a "quack", when the use of that defamatory term is "justified" by nothing more than that the two physicians represent competing schools of medical thought.

In the present case, the highest court in New York State has refused to uphold its *own law*, alleging wrongly that all medical testimony is "absolutely privileged". The State has given no reason why its own prior case law should be ignored.

The question is this: Is it lawful for New York State to refuse, without

cause or explanation, to *uphold* this legal precedent which the State itself set over 130 years ago, and which has been cited as case law as recently as 1975?

TABLE OF CONTENTS

Question Presented for Review 2

Table of Authorities 5

Opinion Below 7

Jurisdiction 8

Constitutional Provision Involved 8

Statement of the Case 10

Reasons for Granting the Writ 19

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE, IN AFFIRMING THE DISMISSAL OF PETITIONER'S CASE FOR DEFAMATION, THE HIGHEST COURT OF THE STATE OF NEW YORK HAS RENDERED AN OPINION IN DIRECT CONFLICT WITH ITS OWN PRIOR OPINION AS EXPRESSED IN WHITE v. CARROLL (42 New York – 3 Hand. 161) 19

Conclusion - Petitioner's notarized signature 39

Appendix 1 - Opinion of the New York State Supreme Court 40

Appendix 2 - Opinion of the Appellate Division of the NYS Supreme Court 44

Appendix 3 - Decision of the New York State Court of Appeals 47

Affidavit of Service 49

TABLE OF AUTHORITIES

White v. Carroll,
42 New York - 3 Hand, 161 .... 19, 20, 21, 24, 25, 26, 30, 34, 37

Wiser v. Koval et al,
50 Appellate Division NY 2d 523 ... 20

United States Constitution, Amendment Fourteen 8

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

KEN BIEGELEISEN, MD,
Petitioner,

v.

JULIUS JACOBSON, MD,
Respondent.

Petition for a Writ of Certiorari
to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ken Biegeleisen, MD, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York State Court of Appeals regarding the issues of testamentary immunity raised therein.

OPINION BELOW

The opinion of the New York State Supreme Court appears at Appendix 1.

The opinion of the Appellate Division of the New York State Supreme Court appears at Appendix 2.

A Motion for Leave to Appeal to the New York State Court of Appeals was denied by the New York State Court of Appeals. See Appendix 3.

JURISDICTION

The New York State Court of Appeals filed its opinion on April 28, 1994 (Appendix 3). This petition is filed within ninety (90) days of the opinion. Jurisdiction of this Court is predicated on 28 U.S.C. §1254(1)

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the Constitution says that "No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws".

Three people: a medical plaintiff, a lawyer, and an "expert" witness; have deprived me of property, employing the non-Constitutionally-sanctioned doctrine of "testamentary immunity" as a personal weapon against me. They have, in effect, committed legally-sanctioned perjury for personal gain.

In spite of years of exhausting efforts to find justice, the law has provided no remedy for this.

A legal system which provides a mechanism for the unscrupulous to rob and defame the innocent, and which denies the innocent any means of legal recourse, cannot be said to be providing "equal

protection of the laws" to all its citizens.

STATEMENT OF THE CASE

This case is not about "hurt feelings". I do not care what people call me, either on or off the witness stand.

But in the month of December, 1991, I was convicted of a "crime" I did not commit. I was convicted by perjurious testimony. This, and this alone, is the injustice which gives rise to this Petition.

In the underlying medical malpractice case *Brotman vs. Biegeleisen*

(NY State Supreme Court Index no. 1984/86), I was accused by the plaintiff, Valerie Brotman, of causing permanent neurological damage to the entire outside of her left leg, from the knee down to the tips of the toes. This allegedly came about as a result of injection treatment for a common cosmetic problem, known to the public as "spider veins". The treatment was *bilateral*. This so-called "complication"; massive *unilateral* destruction of large portions of the nervous system by tiny injections into the skin, is unknown to medical science.

The patient had sciatica before I ever met her. The records of the chiropractor who had treated her for sciatica were subpoenaed, but they had conveniently been "lost".

No one involved in the defense against this ridiculous accusation ever dreamed that the plaintiff might prevail, but she *did*. Her victory was made possible by the perjurious testimony of Julius Jacobson, MD.

Dr. Jacobson began his testimony with the statement

> **"This is quackery. This is unethical pursuance of money by somebody who happens to have an MD degree but has no principles".**
>
> (Jacobson testimony, p. 28).

The remainder of his lengthy testimony was an astonishing collection of lies, some of them so obvious that a

lay person *should* have recognized them as lies at face value.

But Jacobson proudly trumpeted his lofty *credentials* (he is, among other things, Chairman of Vascular Surgery at New York's Mount Sinai Medical Center), and the jury chose veneer over truth.

His motivation need not be speculated about. He admitted, repeatedly while under oath, that he was in Court specifically to

"put Dr. Biegeleisen out of business".

(Jacobson testimony, pp. 42-43, reiterated on p. 45, reiterated *again* on pp. 47-48)

Now, I have not, to this day, ever met Dr. Jacobson, and I do not know him personally. But he also testified, under oath, that he wanted to put my *father* out of business (see pp. 47-48 of Jacobson testimony).

My father, Dr. H.I. Biegeleisen, and Julius Jacobson were profession *rivals* throughout their careers. My father was a pioneer in the development of injection treatment of varicose veins, a procedure he dubbed "sclerotherapy". Jacobson was a leading practitioner of the *surgical* treatment of varicose veins, called "stripping".

Throughout the 20th century, practitioners of treatment of varicose veins by injection and surgery have been at odds with each other. Historically,

from about 1900 until about 1920, most veins were treated surgically. Then the "mood" of the medical profession changed, and from about 1920 to 1940, virtually all varicose veins were *injected*. It was during that period that my father rose to prominence in this field.

After 1940, the "mood" of the medical profession changed again, and by 1960, virtually all varicose veins were again being treated *surgically*. It was during that era that *Jacobson* rose to prominence in *that* field.

Since 1980, reason has prevailed over dogma. Now it is universally recognized, both here and abroad, that both injections *and* surgery have a place in the treatment of varicose veins.

But Dr. Jacobson maintains an extreme prejudice against vein injection; a prejudice which refuses to yield to modern medical research; a prejudice which refuses to consider a massive body of medical literature which is against him; a prejudice which refuses to consider the fact that every single modern textbook of vascular *surgery* includes a detailed description of the indications for, and the method of, the treatment of varicose veins by injection.

Because Dr. Jacobson could not have caused me to lose this case by telling the truth, he opted to lie. It is no exaggeration to say that if I listed all his lies, they would fill this entire booklet, and there would be no room left for discussion.

I shall make specific mention of one such lie. It involved the issue most central to a medical malpractice trial; *causation*. When asked whether I was responsible for the patient's symptom (numbness of the outer side of the left leg, extending from the knee to the ankle), Dr. Jacobson said that he was "**absolutely sure**" that I was; that it was "**beyond question**" (Jacobson testimony, p. 36).

When asked *how* the alleged injury had come about, he testified (pp. 62-68) that I had damaged the entire nervous system of the skin of the outside of the patient's leg, including the major nerve trunk which was responsible for sensation from the knee down to the foot (p. 68). When asked for the name of this nerve, he

testified that the nerves involved have "**no names**", and that they are "**not listed in the anatomy books**" (p. 65). "Call it what you want", he said (p. 63).

I submit to this Court that this testimony, i.e. that

> **the major cutaneous nerve trunk inervating the outside of the human leg from the knee to the tips of the toes has "no name" and is "not listed in the anatomy books",**

is *perjury* at face value.

That notwithstanding, the various divisions of the Courts below were provided with enough supporting affidavits, from highly esteemed medical specialists, to have absolutely dispelled any possible lingering notion that major

nerves of the human body might have "no names".

Jacobson himself, in all his many pages of legal defense, has never denied that he lied. He simply asks the Court's protection, on the grounds that New York law protects *all* testimony given on the witness stand. However, this is ***not true***. New York law does *not* permit one doctor to call another a "quack", when the basis of that remark is no more than that they are in competing specialties.

REASONS FOR GRANTING THE WRIT

The facts in this case are virtually indistinguishable from the facts in *White*

v. Carroll (42 NY - 3 Hand, 161), a nineteenth century case which is cited 47 times in Shepard's New York Citations. I have located at least one citation as recent as 1975 (*Wiser v. Koval*, 50 Appellate Division NY 2d 523-524). Thus, the findings of the *White* Court are still held to be valid case law in the State of New York.

White v. Carroll was a case arising from a dispute between members of two competing medical specialties, *allopathy* and *homeopathy*. In 1858 and 1859 a proceeding was going on before the surrogate of Montgomery county, New York, regarding the testamentary capacity of a man by the name of Jay Phillips, who had been under the care of both the plaintiff, a homeopath, and the

defendant, an allopath. The defendant was asked whether there was any other physician in attendance on Mr. Phillips at that time, and he answered "Not as I know of". The question was re-phrased, to which the defendant replied

> **"Not as I know of; *I understand he had a quack*, I would not call him a physician; I understand that Dr. White, as he is called, had been there".**

These words were transcribed, and the plaintiff, Dr. White, subsequently brought an action for slander and libel.

The defendant moved for dismissal on the grounds that his testimony was pertinent and responsive, and therefore

absolutely privileged. The motion was denied, and the defendant excepted.

The Judge in the trial Court instructed the jury that

> **"if...they should believe from [the] evidence, that the defendant, though testifying at the time as a witness, and as such entitled to the protection of the law, in so using the words proved, was actuated by malice; that he used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him, and he became amenable to the consequences of uttering the**

slander, or of publishing the libel".

The defendant appealed to the New York State Court of Appeals, which unanimously *upheld* the Judgment, stating that

"the question whether the defendant was protected under the circumstances, was not a question of law for the court, but was a question of fact for the jury. It was really a question of conduct, of motive, of good faith and honest purpose, or of bad faith and malicious purpose.

"The question was, whether the defendant did, or did not, avail himself of the occasion to maliciously answer the questions put to him as a witness, in the way he did.

"The question was most emphatically a question for the jury; and I think it was submitted to the jury as favorably for the defendant as he had a right to expect or ask...I think the judgment should be affirmed, with costs."

The parallels between *White v. Carroll* and the present case are as exact as can be, except that the malice

expressed by Jacobson *exceeds*, by many orders of magnitude, the malice expressed by Dr. Carroll.

In *White v. Carroll*, the plaintiff was a homeopath, a *less* traditional form of medical practice, and the defendant was an allopath, a *more* traditional form of medicine.

In Biegeleisen v. Jacobson, the plaintiff is a medical doctor specializing in the treatment of venous diseases by injection, a widely-practiced but *less* traditional form of medical practice, and the defendant is a surgical doctor specializing in the treatment of venous diseases by surgery, a *more* traditional form of medical practice. Thus the parallel is quite exact.

The defendant called me a "quack", and then produced, in "evidence" of this, a collection of towering lies. His motive is no mystery; he himself openly and proudly admitted it: he was in Court to put both my father and me out of business.

The *White* Court referred to a witnesses "conduct, motive, good faith and honest purpose". Dr. Jacobson's conduct was repulsive, his motive was openly evil, his good faith was nowhere in evidence, and in 104 pages of testimony, there was hardly a statement to be found which was not a lie.

Above all, he deceived the court into awarding money to a plaintiff with no injuries, by claiming damage to nerves with "no names", "not found in

textbooks", according to a mechanism not known to medical science. If this is not injustice, then there *is* no injustice.

Excepting the possibility that I *am* a "quack", the law of New York State appears to me to be absolutely clear in prohibiting the use of the witness stand as a place to exact a personal or professional vendetta against another physician.

Therefore, I am forced, once again (having done so in the lower Courts), to raise the question: Am I a "quack"?

I have presented papers, lectured, and chaired symposia at most of the major American and International venous vascular conventions of the last 15 years, often by invitation of Jacobson's own colleagues in vascular surgery. I

have published numerous papers in peer-reviewed scientific and medical journals. I recently authored a chapter in a major venous diseases textbook to be published by Mosby, one of the nation's leading conservative medical publishers.

I may not be the world's greatest doctor, but I do not think that my activities are adequately described by the word "quackery".

Furthermore, the methods I use, contrary to Jacobson's perjurious testimony, are practiced by literally thousands of physicians throughout the United States. They have become part of the standard practice of medicine in America.

Indeed, Dr. Robert Berger, a dermatologist who practices the same

technique I use, so testified in the lower Court on my behalf. Dr. Berger is at Jacobson's *own hospital*, Mount Sinai Medical Center. Furthermore, Jacobson's Department of Vascular Surgery, over which he presides as Chairman, conducts an annual Venous Symposium at which Dr. Berger is an invited participant.

Every year at this Symposium, Dr. Berger, by invitation of Jacobson's own Department, presents a lecture demonstration on the injection treatment of spider veins by the *same method I use*.

And yet Dr. Jacobson, while testifying under oath, having been asked whether there were any dermatologists in New York who inject spider veins, had the chutzpah to say

"I don't know of any dermatologists who do it in New York".

(Jacobson testimony, p. 48).

What harm was done to the plaintiff in *White v. Carroll,* that the Court should have permitted an action for defamation? None, save that his good name was the subject of insult. It seems unlikely that many people ever became aware of this insult.

And yet, substantial harm has been done to me. My name has now been added to the so-called "National Practitioner Data Bank", alongside all other physicians who have been convicted of the crime of medical malpractice. This databank is open to the public, so that the whole world can see that I am a

"dangerous criminal". And what was my crime? I injected a nerve with "no name", "not found in textbooks". What sort of a nation is this?

I recently received an extortionist letter from an attorney who was contemplating a frivolous lawsuit against me. She wrote that

> **"My investigation has revealed that there have been several claims initiated against you, including a full jury trial verdict of approximately $35,000 in the matter of Brotman v. Biegeleisen...In order to avoid the necessity of litigation, which will prove costly to you in that you must retain counsel, we will agree to a settlement amount in excess of**

the amount awarded in the Brotman matter".

This is, plainly and simply, blackmail. Do NOT, therefore, say that "no harm has been done".

If the Court cannot issue a Writ of Certiorari in this case, then I maintain that there is no possibility of justice for a physician. Jacobson did not read the medical record before testifying, and he boasted of that as if it was to his credit to have come to Court ignorant. He did not examine the patient, claiming falsely that "no examination was possible" in such cases. And, he did not know who he was testifying against. That's right - he admitted, under oath,

that he was not sure exactly *who* had administered the treatment he was in court testifying about; whether it was me, or whether it was my father:

> **"I had patients that had been seen by the father, and I knew he had a son in practice. And I wasn't sure who had actually given it** [i.e., the treatment]" (Jacobson testimony, p. 86).

If this Court is so desirous of getting witnesses to come to Court and testify "freely" that it will tolerate an "expert" who didn't read the medical record, didn't examine the patient, didn't know who he was testifying against, and claimed that the major

cutaneous nerve trunk inervating the outside of the leg has "no name" and is "not found in textbooks", then I say that a medical malpractice trial in America is nothing but a ***sham***; a charade, acted out solely for the personal benefit of the members of the legal profession and their clients.

The *White* Court held that one physician cannot call another a "quack" simply because they are in competing fields of medicine. Surely, the testimony of Dr. Carroll, in that case, cannot conceivably be held to have been "impertinent by any standard", since it was given in response to a question put to him by the court itself about his adversary-to-be, Dr. White. But the injection of the word "quack" was held by

that court to have been motivated by malice, and therefore actionable.

Dr. Jacobson's testimony, in the present case, was more malicious by many orders of magnitude than that of Dr. Carroll. I am not a "quack", and the methods I practice are in widespread use, both throughout the United States and abroad. I have been defamed, and, worse still, I have been convicted of a crime I did not commit.

I am asking this Court, in the interests of justice for both doctor and patient, to do the right thing. I am asking this Court to issue a Writ of Certiorari in this case, so that these wrongs can be righted.

STAGE OF THE PROCEEDINGS OF THE COURTS BELOW AT WHICH QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

I am a *pro se* litigant. When I initiated this case, I was unable to find a lawyer to represent me. Because the law leans strongly toward testamentary immunity, no lawyer I consulted with was willing to accept this case.

So in the beginning I employed the services of a personal friend, Mr. Jan Blau, an attorney with no experience in slander/libel. He refused to let me see any of his legal papers, and therefore, at all times in the proceedings before the lower court and the Appellate Division, I was ignorant of what he had submitted.

At the Appellate Division, his oral arguments bore no resemblance to the discussions we had had about the case, and I therefore discharged him and proceeded *pro se*.

The legal questions raised in this Petition were raised by me in my "Affidavit of Ken Biegeleisen sworn to May 20, 1992 in Opposition to Defendant's Motion to Dismiss", submitted to the Supreme Court of the State of New York. Appended to that Affidavit in Opposition were seven Exhibits (A-G) which are critical to my defense against the multiple defamations I have been subjected to.

In particular, the parallels between this case and *White vs. Carroll* are given on pages 17-20 of that Affidavit.

All of the lower courts totally ignored this Affidavit, each one alleging that medical expert testimony is "absolutely privileged".

Regarding my former attorney's various submissions to the courts below, however, I did not have anything to do with their preparation, and I was not permitted to see them until long after they were submitted. To the extent that I understand them, they do not seem to represent my point of view, and they do not reflect the discussions we had which supposedly led to their creation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for the issuance of a writ of certiorari.

Respectfully submitted,

KEN BIEGELEISEN, MD

Pro se
770 Lexington Avenue
New York, NY 10021
(212) 223-8100

"I declare under penalty of perjury that the foregoing is true and correct. Executed on July ____, 1994.

KEN BIEGELEISEN, MD

Sworn to before me this _____ day of July, 1994.

Notary Public

Appendix 1

DECISION OF THE

NEW YORK STATE SUPREME COURT

NEW YORK COUNTY, IAS PART 10

KEN BIEGELEISEN, M.D.,)

Plaintiff,)INDEX #2096/92-001

)

v.)Cal. #13 - 6/1/92

)

JULIUS JACOBSON, M.D.,)

Defendant)

SHAINSWIT, J.:

Plaintiff doctor was the defendant in a medical malpractice suit, against whom the jury awarded money damages; defendant doctor was the expert witness

for plaintiff in that suit. Plaintiff now sues for defamation; defendant moves to dismiss. The motion is granted. There are several independently conclusive reasons why the complaint cannot stand.

(1) An expert witness at trial is immunized from a suit for defamation. His relevant testimony is absolutely privileged, whether he testifies as to opinions or as to alleged facts. Tolisano v. Texon, 75 NY2d 732 (1989); Star v. Simonelli, 76 AD2d 861 (2d Dept. 1980).

(2) Nothing in the material complained of was irrelevant to the issues being tried, or to the subject matter of the defendant doctor's expertise.

(3) A defamation suit cannot be used as a vehicle to retry the probative value of the expert testimony. It is for the jury to make that evaluation. The jury cannot be second-guessed by the unsuccessful party taking the defamation route.

(4) To permit a defamation suit of this nature would tend to stifle the willingness of experts to come forward. It would be against public policy to set up an iron curtain barring access to the witness box.

(5) If this case were tolerated, a disgruntled and unsuccessful litigant could use the defamation suit to harass witnesses who testified in a manner or on subjects not to a litigant's liking. We would thus be opening up retaliatory

lawsuits designed to retry, in a new setting, issues that had become res judicata.

Society has a compelling interest to insure that controversies are disposed of with finality, through traditional legal procedures. The instant defamation suit seeks to create new warfare, with all issues now ripe for rekindling. This court will not permit the resumption of a battle which has been concluded by a jury.

This constitutes the decision and order of the court.

Dated: July 10, 1992.

J.S.C.

(Filed, July 10, 1992, County Clerk's Office, New York)

Appendix 2

DECISION OF THE

APPELLATE DIVISION, 1ST DEPARTMENT OF THE

NEW YORK STATE SUPREME COURT

Rosenberger, J.P., Wallach, Kupferman, Kassal, JJ.

50170 Ken Biegeleisen, M.D.,

Plaintiff-Appellant,

-against-

Julius Jacobson, M.D.,

Defendant-Respondent.

Order, Supreme Court, New York County (Beatrice Shainswit, J.), entered

July 17, 1992, which granted defendant's motion for summary judgment dismissing this defamation action, unanimously affirmed, without costs.

The statements defendant made during his testimony as an expert witness in the medical malpractice action that had been brought against plaintiff cannot be the subject of a defamation action unless they constituted falsehoods "so obviously irrelevant as to warrant an inference of express malice" (Tolisano v Texon 144 AD2d 267 [Smith, J. dissenting], revd for reasons stated in dissenting mem 75 NY2d 732). Such is not here the case. Although blunt and degrading, the statements were primarily expressions of opinion, not of facts, and in any event, were directly relevant to defendant's

opinion concerning the status of sclerotherapy as an accepted medical practice for cosmetic surgery. Nor does it avail plaintiff to argue that certain of defendant's statements were not only factually false but perjurious.

We have considered plaintiff's remaining contentions and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: November 9, 1993

_____

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Appendix 3

DECISION OF THE

NEW YORK STATE COURT OF APPEALS

State of New York,

Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the 28th day of April 1994.

Present, Hon. Judith S. Kaye, Chief Judge, presiding

1-10 Mo. No. 263

Ken Biegeleisen, M.D.,

Appellant,

v.

Julius Jacobson, M.D.,

Respondant.

Motions for leave to appeal to the Court of Appeals and to enlarge the record on appeal in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are denied.

Donald M. Sheraw

Clerk of the Court

AFFIDAVIT OF SERVICE

RUTH NIELSEN, being duly sworn, deposes and says:

I am not a party to the within action; I am over 18 years of age and reside in New York, New York.

On July _____, 1994 I served 3 copies of a PETITION FOR A WRIT OF CERTIORARI by mailing same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the United States Postal Service within the State of New York, to;

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Bower Gardner
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New York, NY 10022

Att: Michael M. Futterman
(212-751-2900)

(over)

"I declare under penalty of perjury under the laws of the United states of America that the foregoing is true and correct. Executed on July _____, 1994.

_____
Ruth Nielsen

Sworn to before me on this _____ day of April, 1994.

_____

Notary Public

(2)

Supreme Court, U.S.
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No. 94-175

In The

Supreme Court of the United States

October Term, 1994

KEN BIEGELEISEN, M.D., pro se,

Petitioner,

vs.

JULIUS JACOBSON, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the decision of the New York State Court of Appeals, denying Petitioner leave to appeal the New York Appellate Division's affirmation of the trial court's grant of summary judgment against the Petitioner's defamation action based on the doctrine of absolute witness immunity in conflict with prior decisions of New York State's highest appellate tribunal, thus depriving the Petitioner Due Process?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statement of the Case 2

Reasons for Denying the Writ 4

I. The New York State Court of Appeals decision denying Petitioner's leave to appeal the New York Appellate Division's affirmation of the trial court's grant of summary judgment against the Petitioner's defamation action based on the doctrine of absolute witness immunity is not in conflict with prior decisions of the Appellate Courts of New York State 4

II. The New York State decisions on testimonial immunity are in accord with the decisions of the U.S. Circuit Courts of Appeals and the United States Supreme Court 6

III. Determination by the Appellate Court of New York State that the testimony of the Respondent at trial was relevant to the issues and subject matter on trial was a determination of FACT and does not warrant review by this Court 7

Conclusion 8

Appendix A – Decision of the New York Supreme Court Appellate Division for the First Department dated February 1, 1994 ..... 1a

TABLE OF AUTHORITIES

Page

CASES CITED:

Briscoe v. Lahue, 406 U.S. 325 (1983) 6, 7

Imbler v. Packtman, 424 U.S. 409 (1976) 6, 7

Marsh v. Ellsworth, 50 N.Y. 309 (1872) 5

Martirano v. Frost, 25 N.Y.2d 505 (1969) 5

Star v. Simonelli, 76 A.D.2d 861 (N.Y. App. Div., Second Dept. 1980) 5

Tolisano v. Texon, 75 N.Y.2d 732 (1989) 5

United States v. Johnson, 268 U.S. 220 (1925) 7

White v. Carroll, 42 N.Y. 161 (1870) 4, 5, 6

Wiser v. Koval, 50 A.D.2d 523 (N.Y. App. Div., First Dept. 1975) 5

No. 94-175

In The

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KEN BIEGELEISEN, M.D., pro se,

Petitioner,

vs.

JULIUS JACOBSON, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Julius Jacobson, M.D., respectfully submits this brief in opposition to petitioner's request that a Writ of Certiorari issue to review the decision and judgment of the New York State Court of Appeals, filed April 28, 1994, which denied leave to appeal a decision of the Appellate Division, First Department of the New York State Supreme Court, filed November 9, 1993.

OPINIONS BELOW

The decision of the New York State Supreme Court is reproduced in Appendix to the Petition.

The decision of the New York State Appellate Division First Department is reproduced in Appendix to the Petition #1.

The decision of the New York State Appellate Division First Department denying leave to Appeal to the New York Court of Appeals is reproduced in Respondent's Appendix 1a.

The decision of the New York State Court of Appeals denying leave to appeal is reproduced in Petition Appendix #3.

STATEMENT OF THE CASE

The Petitioner erroneously labels the issue as one of "testamentary immunity" when in fact the subject matter is testimonial immunity.

The Petitioner alleges in his Brief that he was convicted of a "crime" by the jury's monetary award in the medical malpractice suit (Page 10). This is a total misstatement of fact. There are no criminal implications in this entire matter.

The Petitioner, a medical doctor, was a defendant in a medical malpractice suit in the State of New York, against whom a jury awarded money damages.

The Respondent, a medical doctor, gave expert medical testimony during that trial, on behalf of the allegedly injured patient, during which he testified that the medical procedure used by the Petitioner on the patient, amounted to "quackery" and the Petitioner should be "put out of business."

The Petitioner then brought an action for defamation against the Respondent, wherein the only basis asserted for the defamation was the trial testimony.

The Trial Court granted Summary Judgment in favor of the Respondent, based *inter alia,* on the principle that "an expert witness at trial, is immunized from a suit for defamation based on his trial testimony, and that nothing in the material complained of was irrelevant to the issue being tried, or the subject matter of the petitioner's medical expertise." (See Petition Appendix #1).

The Appellate Division First Department of the New York Supreme Court denied the Petitioner's appeal, stating that "the statements defendant made during his testimony as an expert witness in the medical malpractice action . . . cannot be the subject of a defamation action unless they constituted falsehoods so obviously irrelevant as to warrant an inference of express malice . . . such is not here the case." (Petition Appendix #2).

The Petitioner sought permission, pro se, from the Appellate Division First Department of the New York Supreme Court for leave to appeal to the New York State Court of Appeals and was denied and ordered to pay $100.00 costs. (Respondent Appendix #1A).

Petitioner then sought permission from the State of New York Court of Appeals for leave to appeal and was denied on April 28, 1994. (Petition Appendix #3).

The Petitioner does not show any compliance with the considerations governing review on Writ of Certiorari (Rules of the Supreme Court #10) in that no Federal question of law, or conflict of laws is involved. Nor is a

question of departure from the usual course of judicial proceedings truly at issue.

REASONS FOR DENYING THE WRIT

I

THE NEW YORK STATE COURT OF APPEALS DECISION DENYING PETITIONER'S LEAVE TO APPEAL THE NEW YORK APPELLATE DIVISION'S AFFIRMATION OF THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT AGAINST THE PETITIONER'S DEFAMATION ACTION BASED ON THE DOCTRINE OF ABSOLUTE WITNESS IMMUNITY IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THE APPELLATE COURTS OF NEW YORK STATE.

The petition in this proceeding fails to satisfy any of the criteria determining whether to grant a Writ of Certiorari. The Courts below properly adhered to the prior decisions of New York State's highest appellate tribunal, The Court of Appeals, and they applied the law in a manner that is fully consistent with the undisputed facts and the decisions rendered by other Courts that have addressed similar issues.

Petitioner mistakenly cites *White v. Carroll*, 42 N.Y. 161 (1870), as being directly in conflict with the decision in his case by the New York State Court of Appeals.

The pro se Petitioner is probably struck by the coincidental similarity of facts in both cases; in that they both arose from the remarks made by a medical doctor concerning a competing doctor, who practices a medical technique directly contrary to the testifying doctor's personal

beliefs and practice. In that matter during testimony Dr. Carroll described Dr. White as a "quack" and Dr. White sued him for defamation, as is similar to the facts in this case. However, that is where the similarity ends.

In the *White* case, the subject matter of the underlying trial was the testamentary capacity of a deceased patient of both doctors. In the case before this Court, the subject matter of the underlying trial was whether the medical procedures used by the Petitioner were medically acceptable and whether the Petitioner had committed the civil tort of malpractice against the complaining patient. The Respondent herein was testifying as a medial expert witness, on behalf of the complaining patient, on the subject then in issue, i.e., the medical competency of the Petitioner himself. The New York Appellate Division found that Dr. Jacobson's opinion although, "delivered in a blunt and degrading manner" was totally relevant to the subject matter, (Petition Appendix #2 at page 45) and thus he enjoyed the absolute privilege of the protective shield from any legal ramifications of what he said during testimony.

The prevailing rule of law in New York State regarding remarks made during testimony has been consistent. A witness is immunized from a suit for defamation, provided his testimony is relevant to the issue on trial. *See Tolisano v. Texon*, 75 N.Y.2d 732 (1989); *Martirano v. Frost*, 25 N.Y.2d 505 (1969); *Marsh v. Ellsworth*, 50 N.Y. 312 (1872); *White v. Carroll*, 42 N.Y. 161 (1870); *Star v. Simonelli*, 76 A.D.2d 861 (N.Y. App. Div., Second Dept. 1980); *Wiser v. Koval*, 50 A.D.2d 523 (N.Y. App. Div., First Dept. 1975).

II

THE NEW YORK STATE DECISIONS ON TESTIMONIAL IMMUNITY ARE IN ACCORD WITH THE DECISIONS OF THE U.S. CIRCUIT COURTS OF APPEALS AND THE UNITED STATES SUPREME COURT.

The United States Supreme Court has reviewed the subject of absolute witness immunity on many occasions for particular refinements of the general rule, but has never waivered from support of the general principle. *See Briscoe v. Lahue,* 460 U.S 325 (1983). *See also Imbler v. Pachtman,* 424 U.S. 409 (1976).

The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English Common Law. *Briscoe,* 460 U.S. at 331. The American rule adopted the English Common Law rule of privilege for witnesses in judicial proceedings but added a requirement that the statements be relevant to the judicial proceeding. Once this threshold has been met the witness enjoys an absolute privilege. *See Briscoe* at 331.

In discussing *White v. Carroll,* the Supreme Court in *Briscoe v. Lahue* interpreted the requirement of "good faith" on the part of the witness as being established as a matter of law if the statements were pertinent and material to the judicial proceeding and given in response to questions. *Briscoe,* at 332, n.11.

Public policy supports absolute immunity from damages liability for witnesses based on their testimony at judicial proceeding. The Court in *Briscoe* cautioned that such immunity is necessary to avoid self censorship of

witnesses in that witnesses would be reluctant to testify or testimony may be distorted by fear of subsequent liability, *Briscoe*, 460 U.S. at 333; *see also Imbler*, 424 U.S. at 427, n.23 ("In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding").

There are no facts in this case that warrant a review of this well established policy by this Court.

III

DETERMINATION BY THE APPELLATE COURT OF NEW YORK STATE THAT THE TESTIMONY OF THE RESPONDENT AT TRIAL WAS RELEVANT TO THE ISSUES AND SUBJECT MATTER ON TRIAL WAS A DETERMINATION OF FACT AND DOES NOT WARRANT REVIEW BY THIS COURT.

The relevancy of the Respondent's testimony in the malpractice action is self evident and The Appellate Division found it to be completely so. Although the Court found the testimony to be "blunt and degrading" nonetheless it found the statements were primarily expressions of opinion not of facts and in any event were directly relevant to the defendant's opinion concerning the status of sclerotherapy as an accepted medical practice for cosmetic surgery. (Decision of the Appellate Division of the State of New York – Petition Appendix #2 at page 45 and 46).

It has long been the rule that this Court will not grant certiorari to review the factual determinations made by the lower Courts. *See United States v. Johnson*, 268 U.S.

220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.") Nothing in this case suggests that a departure from this well conceived rule is appropriate.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for a Writ of Certiorari should be denied.

Dated: August 17, 1994

Respectfully submitted,

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APPENDIX – DECISION OF THE NEW YORK SUPREME COURT APPELLATE DIVISION FOR THE FIRST DEPARTMENT DATED FEBRUARY 1, 1994.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 1, 1994

Present –
Hon. Ernst H. Rosenberg Justice Presiding
Richard W. Wallach
Theodore R. Kupferman
Sidney H. Asch
----------x Justices.

Ken Biegeleisen, M.D.

Plaintiff - Appellant,

-against- M-6830

Julius Jacobson, M.D.,

Defendant - Respondent.
----------x

The above-named plaintiff-appellant having moved for reargument of the decision and order of this Court entered on November 9, 1993 (Appeal No. 50170), Or, alternatively, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is denied with $100 costs.

ENTER:

Clerk.